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Nos. 95-259 and 95-779

In The

Supreme Court of the United States

October Term, 1995

DARLENE WALTERS and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioners,

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC. and LEONARD D. BIEBER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Congress restricted the application of Title VII of the Civil Rights Act of 1964 to "employer[s]." Section 701(b) of Title VII defines the term "employer" with reference to the number of employees a defendant "has . . . for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b). This case presents two methods of determining whether a defendant had the requisite number of employees for the requisite number of weeks to qualify as an "employer" subject to Title VII of the Civil Rights Act of 1964 as amended.

The question presented is whether an individual should be counted toward the jurisdictional minimum only on those days he or she is at work or is otherwise paid, or for each day of a calendar week merely because he or she is on the payroll each day during that week.

PARTIES TO THE PROCEEDINGS

Respondent, Metropolitan Educational Enterprises, Inc., has no parent companies or subsidiary companies to be listed pursuant to Rule 29.6

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Metropolitan Educational Enterprises, Inc. and Leonard D. Bieber, respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the Seventh Circuit's opinion in this case.

OPINIONS BELOW

The opinion of the court of appeals (95-259 Pet. App. 1a-12a) is reported at 60 F.3d 1225. The opinion of the district court (95-259 Pet. App. 13a-19a) is reported at 864 F. Supp. 71.

JURISDICTION

On July 18, 1995, the court of appeals entered its judgment affirming the district court's dismissal of the petitioners' action for want of subject matter jurisdiction. Walters filed her petition for a writ of certiorari (No. 95-259) on August 14, 1995 and a supplemental brief in support of her petition on August 24, 1995.

On October 10, 1995, Justice Stevens granted the Solicitor General's application for an extension of time to file a petition for a writ of certiorari on behalf of the Equal Employment Opportunity Commission to and including November 15, 1995. The Solicitor General filed its petition for a writ of certiorari (No. 95-779) on November 15, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 701(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, provides in relevant part:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person. . . .

42 U.S.C. § 2000e(b). Section 701(b) and other relevant provisions of Title VII of the Civil Rights Act of 1964, are reprinted at 95-259 Pet. App. 20a-23a.

STATEMENT OF THE CASE

1. Metropolitan Educational Enterprises, Inc. sells and finances encyclopedias and other educational materials in interstate commerce. R. 40 ¶ 1. Leonard Bieber is the president of Metropolitan.

Darlene Walters was employed by Metropolitan as a collector from January 3, 1986 until she resigned on Tuesday, April 10, 1990. Two days after she resigned, Walters filed a charge of discrimination against Metropolitan. Her charge alleged that in September 1989, some eight months earlier, Metropolitan had denied her a promotion to the position of credit manager on account of her gender. The

EEOC investigated the charge and later determined that the evidence did not establish a violation because the individual Metropolitan hired was better qualified for the position.

Walters returned to Metropolitan and asked to be rehired on Friday, April 13, 1990. Metropolitan allowed Walters to return to the job from which she had resigned only three days earlier.

On Monday, April 23, 1990, Metropolitan learned that Walters had been seeking employment with one of its competitors and terminated Walters for unsatisfactory job performance. Walters filed a second charge of discrimination against Metropolitan on April 30, 1990. In her second charge of discrimination, Walters alleged that Metropolitan had retaliated against her for having filed the charge of discrimination based upon its failure to promote her to the position of credit manager.

2. The EEOC filed suit against Metropolitan and its president, Bieber, on April 7, 1993. The EEOC invoked the district court's jurisdiction under Sections 706(f)(1) and 706(f)(3) of Title VII. 42 U.S.C. §§ 2000e-5(f)(1), (f)(3). In addition, the EEOC invoked the district court's jurisdiction under 28 U.S.C. § 1343(a)(4) (vesting the district courts with original jurisdiction in civil rights cases) and 28 U.S.C. § 1345 (vesting the district courts with original jurisdiction of civil actions commenced by agencies of the United States).

The EEOC alleged that Metropolitan had retaliated against Walters in violation of Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), by discharging her for having filed a charge of discrimination. Walters intervened as a matter

of right under 42 U.S.C. § 2000e-5(f)(1) and Rule 24(a)(1) of the Federal Rules of Civil Procedure. Her amended complaint reiterated the EEOC's retaliation claim. Walters further alleged a Title VII claim based upon Metropolitan's failure to promote her and pendent claims for breach of contract and wrongful termination under Illinois law.[1]

3. Metropolitan and Bieber moved to dismiss for lack of subject matter jurisdiction on the ground that Metropolitan was not an "employer" as defined by Section 701(b) of Title VII, 42 U.S.C. § 2000e(b). Respondents argued that Metropolitan did not employ fifteen or more employees on each working day in each of twenty or more calendar weeks in either 1989 or 1990. R. 25; R. 26 at 5. To support their argument, respondents relied upon the Seventh Circuit's decision in *Zimmerman v. North American Signal Co.*, 704 F.2d 347 (7th Cir. 1983), holding that hourly paid workers are not counted toward the jurisdictional minimum number of employees on days when they are neither working nor on paid leave.[2] *See id.* at 354.

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[1] Walters had previously filed an action against the respondents. *Darlene Walters v. Metropolitan Educational Enterprises, Inc. and Leonard Bieber*, No. 92 C 8357 (N.D. Ill., filed Dec. 23, 1992). She voluntarily dismissed that action after the district court granted her leave to intervene in the EEOC's case.

[2] In *Zimmerman*, the court construed the definition of "employer" under Section 11(b) of the Age Discrimination in Employment Act. 29 U.S.C. § 630(b). Both the courts and the petitioners have recognized that the ADEA's definition of "employer" was patterned after Title VII and that the only relevant difference between the two provisions is that Title VII requires a minimum of 15 employees, and the ADEA requires a minimum of 20. *See, e.g., Zimmerman v. North American Signal Co*, 704 F.2d 347, 352 (7th Cir. 1983); *see also* EEOC C.A. Br. at 14 n.

Metropolitan prepared an exhibit to its motion consisting of worksheets for each calendar week of 1989 and 1990. R. 26 at Tab 5. The worksheets listed the names of each employee on Metropolitan's payroll for the week, the number of hours each employee worked each day and the number of hours for which each employee received holiday pay, sick pay or vacation pay.

Petitioners successfully moved to strike the exhibits to Metropolitan's motion, R. 31-32, and conducted discovery on two central issues. Much of the discovery in this case focused upon whether independent sales representatives were Metropolitan's "employees."[3] Petitioners also undertook to determine the number of employees on Metropolitan's payroll each week and the number of days on which each employee worked or for which they were otherwise paid. The parties compiled weekly summaries of Metropolitan's payroll records for each calendar week of 1990[4] similar to those which Metropolitan had appended to its motion to dismiss. R. 37.

14; Walters C.A. Br. App. A-9, A-10. The EEOC has acknowledged that *Zimmerman's* interpretation of the definition of "employer" under the ADEA is controlling in the context of Title VII. EEOC C.A. Br. at 14 n. 14.

[3] Walters later stipulated that these sales representatives were independent contractors, not employees. R. 40; 95-259 Pet. at 6.

[4] The parties stipulated that Metropolitan did not have 15 or more employees working or on paid leave on each working day of twenty or more weeks during 1989. R. 37 at ¶ 13; Pet. 95-259 at 5-6; Pet. 95-779 at 6 n. 5. Accordingly, the district court concluded that Metropolitan did not fall within Title VII's definition of "employer" for 1989. 864 F. Supp. 71, 72, 95-259 Pet. App. 15a.

The parties submitted their weekly summaries of Metropolitan's payroll records to the district court and stipulated to the following facts. Metropolitan had 15 or more employees working or on paid leave on each working day in only nine calendar weeks in 1990. R. 37 at ¶ 11; 864 F. Supp. at 72; 95-259 Pet. App. 15a. During the remaining 43 calendar weeks of 1990, Metropolitan did not have 15 or more employees working or on paid leave on each working day. R. 37 at ¶ 11; *see* 864 F. Supp. at 72, 95-259 Pet. 15a. The parties further stipulated that there were 15 or more employees on Metropolitan's payroll during 47 weeks in 1990. R. 37 ¶ 12; 864 F. Supp. at 73; 95-259 Pet. App. 15a.

The EEOC argued that *Zimmerman* was wrongly decided and urged the district court to count the number of employees on Metropolitan's weekly payroll regardless of whether they were actually at work or paid for a particular day. 864 F. Supp. at 72-73, 95-259 Pet. App. 17a-18a. The district court rejected the EEOC's proposed "payroll method" and instead applied the method of counting employees set forth in *Zimmerman*. Under this method, the court held that Metropolitan had not employed 15 or more individuals on each working day of 20 calendar weeks during 1990 and dismissed the action for want of subject matter jurisdiction.

4. The Seventh Circuit reaffirmed its holding in *Zimmerman* and affirmed the district court's dismissal of petitioners' action.

REASONS FOR DENYING THE PETITION

1. Respondents acknowledge that the courts of appeals have adopted two methods of counting "employees" and that these methods can lead to different results in determining whether a defendant is an "employer" subject to Title VII of the Civil Rights Act of 1964. However, petitioners have overstated the extent of the conflict between the decision of the Seventh Circuit and the rulings of other federal courts. They have also exaggerated the importance of this conflict. Accordingly, the petition should be denied.

a. While the Fifth Circuit adopted the payroll approach, its decision in *Dumas v. Town of Mt. Vernon*, 612 F.2d 974 (5th Cir. 1980) is not in irreconcilable conflict with the Seventh Circuit's rulings in this case or in *Zimmerman*. Indeed, a careful reading of *Dumas* reveals that its adoption of the payroll method was mere dictum relegated to a footnote. *See Dumas v. Town of Mt. Vernon*, 612 F.2d 974, 979 n. 7 (5th Cir. 1980).

In *Dumas*, the district court found that the defendant municipality had employed as many as 24 employees during the relevant years, but that it never had more than 12 full-time employees[5] on its payroll. *Dumas*, 436 F. Supp. 866, 870, 872 (S.D. Ala. 1977). The district court made no specific findings regarding the number of weeks each employee had worked during the relevant years. *Dumas*, 612 F.2d 974, 979. The court of appeals concluded

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[5] The full-time employees worked forty hours during a five-day work week. *Dumas v. Town of Mt. Vernon*, 436 F. Supp. 866, 870.

that even if all of the town's CETA and part-time employees were counted toward the jurisdictional minimum for each day they were on the payroll regardless of whether they were actually working on a particular day, the town still did not employ 15 or more employees in at least 20 weeks. *Id.* Thus, whether the Town of Mt. Vernon was an "employer" did not depend upon the counting method the Fifth Circuit adopted.

b. While the First Circuit has adopted the payroll method, neither of its two decisions applying the payroll method have cited, much less analyzed, *Zimmerman*.

When the First Circuit adopted the payroll method of counting employees, it stated that "every court which has addressed the issue" had done so. *See Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633, 634 (1st Cir. 1983), *cert. denied*, 466 U.S. 904 (1984). The court failed to acknowledge that the Seventh Circuit had already adopted a different method in *Zimmerman*. Worse, the *Thurber* court failed to cite or discuss *Zimmerman*. Instead, it relied in part upon *Pascutoi v. Washburn-McReavy Mortuary*, 11 Empl. Prac. Dec. ¶ 10,441 (D. Minn. 1975), *aff'd without opinion*, 466 F.2d 1178 (8th Cir. 1977). Four months earlier, however, the Eighth Circuit had rejected the payroll approach applied in *Pascutoi* and adopted *Zimmerman*. *McGraw v. Warren County Oil Co.*, 707 F.2d 990, 991 (8th Cir. 1983).

The First Circuit's more recent decision in *Vera-Lozano v. International Broadcasting*, 50 F.3d 67 (1st Cir. 1995) likewise failed to cite or analyze the Seventh Circuit's ruling in *Zimmerman*.

c. Petitioners also urge this Court to grant review because the district courts have adopted different

approaches to counting employees under Title VII. Once again, petitioners have exaggerated the extent of the conflict among the district courts. Three of the decisions cited by petitioners were decided before *Zimmerman*. *Hornick v. Borough of Duryea*, 507 F. Supp. 1091 (M.D. Pa. 1980); *Pedreyra v. Cornell Prescription Pharmacies, Inc.*, 465 F. Supp. 936 (D. Colo. 1979); *Pascutoi v. Washburn-McReavy Mortuary, Inc.*, 11 Empl. Prac. Dec. (CCH) ¶ 10,441 (D. Minn. 1975).

Three of the remaining decisions cited by petitioners are inapposite because the selection of a method for counting employees was not before the court. In *Sheperdson v. Local Union No. 401*, 823 F. Supp. 1245 (E.D. Pa. 1993), for example, the court's decision turned upon *whether* certain individuals should be counted, not *how* they should be counted. *Id.* at 1246. Since the court concluded that the individuals in question were not "employees," it did not have occasion to adopt a method for counting employees. *See id.* at 1257. The courts faced the same issue and reached similar conclusions in *Reith v. Swenson*, 66 Fair Empl. Prac. Cas. (BNA) 885 (D. Kan. 1993) (exclusion of individuals from pool eligible to be counted as "employees" precluded possibility that bank could qualify as an "employer") and in *Simmons v. Vliets Farmers Cooperative Association*, 55 Fair Empl. Prac. Cas. (BNA) 1341 (D. Kan. 1991) (cooperative did not employ the requisite number of employees for the requisite number of weeks under Title VII or ADEA even when truck driver, farmers and directors were counted as "employees".)

Three of the cases cited by petitioners fail to acknowledge or discuss *Zimmerman*. *Sheperdson v. Local*

Union No. 401, 823 F. Supp. 1245 (E.D. Pa. 1993); *Evans v. Davie Truckers, Inc.*, 38 Fair Empl. Prac. Cas. (BNA) 1553 (D. Kan. 1991); *Lynn v. JER Corp.*, 573 F. Supp. 17 (M.D. Tenn. 1983). Indeed, the district courts in these cases, none of which were bound by controlling precedent within their respective circuits, neither analyzed nor acknowledged the different counting methods.

Several other cases are not even reported in the Federal Supplement or Federal Rules Decisions. The importance of these decisions and their precedential value are questionable.

d. Petitioners suggest that the continued application of the *Zimmerman* will increase the burden upon both the EEOC and the already overburdened district courts. History belies their dire forecast of an EEOC and district courts whose time will be consumed by counting employees. To the contrary, this case, and those like it are anomalies.

In the more than 30 years since Title VII became law, the issue before this Court has arisen in only 15 reported decisions. The EEOC, which is charged with the administration and enforcement of Title VII, appears to have litigated this issue in only two other cases since its creation. *EEOC v. Garden & Associates, Ltd.*, 956 F.2d 842 (8th Cir. 1992); *EEOC v. Argent Industries, Inc.*, 746 F. Supp. 705 (S.D. Ohio 1989).

2. Petitioners portend conflicting decisions and potentially inconsistent results in future cases decided under the Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*, and the Family and Medical Leave

Act of 1993, 29 U.S.C. § 2601 *et seq.*[6] The court below noted "[w]e have not yet been asked to interpret the FMLA and decline to create a conflict where none yet exists." 60 F.3d at 1230; 95-259 Pet. App. 11a. The Solicitor General properly concedes that neither of these statutes is before this Court in this case. 95-779 Pet. at 20-21. How employees should be counted under other statutes should be properly left for another day when that issue becomes ripe for adjudication and a proper record is developed for this Court's consideration.

3. Petitioners assail the circuit court's ruling because it might tend to exclude individuals with flexible work schedules or other more innovative employment arrangements. As respondents noted above, Title VII is now more than 31 years old. Since its enactment, our nation has undergone many changes. "Flextime" and "telecommuting" were unknown phenomena when families gathered around the television to watch Ed Sullivan in 1964. If Title VII is no longer suited to afford adequate protection against discrimination in our changing society, then the task of adapting Title VII to the practical realities of 1996 rests with the Congress, not with this Court. As Judge Ripple noted in his concurring opinion, any ambiguity arising from the divergence of the decisions deserves legislative attention. 60 F.3d at 1230; 95-259 Pet. App. 12a.

4. The court below fully considered and correctly decided the issue before it.

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[6] Neither petitioner has cited authority demonstrating that courts have adopted differing methods of counting "employees" for purposes of the ADA or the FMLA.

a. The Seventh Circuit's interpretation is consistent with the plain language of the statute and accords meaning to the phrase "for each working day." Respondents' interpretation gives effect to the phrase "for each working day" only if one accepts the proposition that Congress intended that phrase to exclude individuals who begin or end their employment during a week. As the court noted below, it is highly doubtful that Congress intended to do so. 60 F.3d at 1228; 95-259 Pet. App. 6a.

b. The legislative history of Title VII does not support the payroll method. In *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633 (1st Cir. 1983), the First Circuit seized upon Senator Dirksen's isolated comment that Congress had borrowed the definition of the term "employer" from the Unemployment Compensation Act. *Id.* at 634; *see also* 26 U.S.C. § 3306(a); 110 Cong. Rec. 13087 (1964); Walters C.A. Br. App. A-27.

Contrary to that analysis, the term "employer" is defined far differently under the Unemployment Compensation Act than under Title VII. Respondents' C.A. Br. at 15. The Unemployment Compensation Act defines "employer" with reference to the number of *days* on which a person has "employed at least one individual. . . . " 26 U.S.C. § 3306(a) (emphasis added). Title VII, by contrast, defines "employer" with reference to the number of *individuals* a person employed as well as the number of weeks during which he or she employed the requisite number of individuals.

The *Thurber* court compounded its error by grafting onto Title VII a 1955 Revenue Ruling holding that

employees are to be counted under the Unemployment Compensation Act throughout the existence of an employment relationship and without regard to when the employee in fact worked. *Thurber*, 717 F.2d at 633-34; *see also* Rev. Rul. 55-19, 1955 C.B. 496. *Thurber* was wrongly decided. Its flawed analysis of the legislative history of Title VII casts doubts upon its precedential value and that of its progeny.

c. The EEOC's interpretation of Title VII's definition of "employer" was not entitled to deference. The EEOC suggests that the conflicting interpretations courts have accorded Title VII's definition of "employer" reflects its ambiguity. As respondents have argued above, however, the conflicts are neither as numerous nor as direct as petitioners suggest. Much of the apparent conflict stems not from any ambiguity in the language of the statute, but from the district courts' misplaced reliance upon the *dictum* found in a footnote in *Dumas v. Town of Mt. Vernon*, 612 F.2d 974 (5th Cir. 1980) and the flawed reasoning of *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633 (1st Cir. 1983). The Seventh Circuit properly concluded that the definition of "employer" is unambiguous. 60 F.3d at 1228; 95-259 Pet. App. 6a. Accordingly, the court was precluded from deferring to the EEOC's interpretation. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 843 n.9 (1984).

Respondents have argued above that the EEOC's interpretation is not reasonable.

The EEOC contends that the court of appeals should have deferred to its interpretation because the court had not yet ruled upon the precise issue before the court *viz.*,

the interpretation of Title VII's definition of "employer." The EEOC has acknowledged that *Zimmerman's* interpretation of the definition of "employer" under the ADEA is controlling in the context of Title VII. EEOC C.A. Br. at 14 n. 14; R. 38 at 7 n. 6. Indeed, the EEOC's 1990 Policy Guidance, one of the very pronouncements to which it seeks deference, purports to address the definition of "employer" under both the ADEA and Title VII. 95-259 Pet. App. 30a-40a; EEOC C.A. Br. App. A-9 through A-14.

The lower court's refusal to defer to the EEOC's interpretation was based, in part, upon the court's finding that its decision in *Zimmerman* predated the Commission's Compliance Manual. 60 F.3d at 1229; 95-229 Pet. App. 10a. Now the EEOC argues, for the first time in this Court, that the court of appeals erred in overlooking an opinion its General Counsel issued in 1966. The EEOC failed, however, to cite this earlier pronouncement in the courts below. The only pronouncement the EEOC cited below was its 1990 Policy Guidance. EEOC C.A. Br. 7 n. 10, 14 n. 14; R. 38 at 14 and Exhibit 2.

CONCLUSION

Respondents respectfully request that the petitions for a writ of certiorari be denied.

Respectfully submitted,

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